Supreme Court, U. S.
FILED
MAR 28 1979
MICHAEL RODAK, JR., CLERK

No. 78-1210

In the Supreme Court of the United States

OCTOBER TERM, 1978

ERNST O. MOENCKMEIER AND JEANENE MOENCKMEIER, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners challenge the enforcement of internal revenue summonses requiring the production of bank records relevant to the investigation of their tax liabilities on the ground that the government did not adequately answer their allegation under 18 U.S.C. 3504 that the summonses were products of illegal electronic surveillance.

The pertinent facts may be summarized as follows: On November 7, 1977, the Internal Revenue Service issued summonses to the Landmark Bank of Orlando directing it to produce certain documents relevant to an investigation of petitioners' tax liabilities for 1974-1976. Petitioners asserted their right under 26 U.S.C. 7609 to stay the bank's compliance with the summonses pending a determination of their enforceability. The United States thereupon instituted this action in the United States District Court for the Middle District of Florida to enforce the summonses (I-R. 1-3).[1] In this summons enforcement proceeding in which petitioners intervened (I-R. 16-20), they asserted a claim of unlawful electronic surveillance pursuant to 18 U.S.C. 3504, which provides that "upon a claim * * * that evidence is inadmissible because it is the primary product of an unlawful act * * * the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act." The government denied petitioners' allegations, and submitted the affidavits of three government officials which denied that any wiretaps were conducted by the Internal Revenue Service (Pet. App. 22-23), the Department of Justice (Pet. App. 21), or the United States Customs Service (Pet. App. 24-25). Two other Internal Revenue Service special agents further testified that no electronic surveillance was used in conducting their investigation (II-R. 10-28, 59-79, 86-90). After finding that the government

[1] "I-R." and "II-R." refer to Volumes I and II of the original record on appeal.

adequately responded to petitioners' electronic surveillance claim (Pet. App. 9), and that the government learned of the possible existence of the bank records through visual, rather than electronic means (Pet. App. 9), the district court ordered the summonses enforced (Pet. App. 10). The court of appeals affirmed *per curiam* (Pet. App. 5).

1. The decision below correctly enforced the summonses directing the production of bank records. Petitioners do not dispute the district court's finding (Pet. App. 8) that the records in question are relevant to their tax liabilities for the years under investigation. Their sole claim (Pet. 9-14) is that they were entitled to cross-examine the three government officials who filed affidavits denying the allegations of illegal electronic surveillance.

There is, however, no such right. As this Court observed in *Gelbard* v. *United States*, 408 U.S. 41, 58 (1972), a claim under 18 U.S.C. 3504 must be "affirm[ed] or den[ied]." Since *Gelbard*, the courts of appeals have uniformly ruled that the adequacy of the government's response under 18 U.S.C. 3504 must be judged in light of the specificity and substantiation of the claim. See, *e.g.*, *United States* v. *Stevens*, 510 F.2d 1101, 1105-1106 (5th Cir. 1975); *United States* v. *Tucker*, 526 F.2d 279, 282 (5th Cir.), cert. denied, 425 U.S. 958 (1976); *United States* v. *See*, 505 F.2d 845 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975).

Here, the government's denial was more than adequate to meet petitioners' vague unsubstantiated claim. The sole basis for petitioners' assertion of

electronic surveillance was that they heard "clicking," "echoes," and other strange noises during their telephone calls (II-R. 31-58, 85-121). But the affidavits of the government officials established (Pet. App. 9) that the information that prompted the issuance of the summonses to the Landmark Bank was not the result of electronic surveillance but arose from the fact that petitioners had claimed the privilege against self-incrimination on their tax returns as a basis for refusing to report their income (II-R. 59-66, 99-101). The Internal Revenue agents who served the summonses and who conducted the Internal Revenue Service's Orlando investigation of petitioners testified that they visually observed Anna Moenckmeier, wife of petitioner Ernst Moenckmeier visiting the Landmark Bank, and that no electronic surveillance was used in the investigation. Moreover, the government submitted affidavits of three other government agents who likewise swore that there had been no electronic surveillance (Pet. App. 21-25; II-R. 21).[2]

These specific denials and explanations by the five government officials who actually conducted the investigations effectively refuted petitioners' speculative claim of electronic surveillance. In these circumstances, the district court correctly concluded that there was no need for cross-examination of the three

[2] The affidavits included one from an agent of the Internal Revenue Service, Intelligence Division, Newark, New Jersey, who was also investigating petitioners' tax liabilities, and from two officials of the Department of Justice and the Customs Service, which were investigating petitioners for possible smuggling of laetrile.

governmental affiants. Accord: *Beverly* v. *United States*, 468 F.2d 732, 744 (5th Cir. 1972); *United States* v. *Stevens*, *supra*; *United States* v. *Park*, 531 F.2d 754, 763-764 (5th Cir. 1976). Moreover, petitioners had a full hearing on their Section 3504 claim, including an opportunity to cross-examine the two government officers most closely involved with the investigation. There is no absolute right of cross-examination of the author of every affidavit filed in response to a Section 3504 claim.

2. Contrary to petitioners' further argument (Pet. 14-22), the decision below does not conflict with *United States* v. *Alter*, 482 F.2d 1016 (9th Cir. 1973); *In re Quinn*, 525 F.2d 222 (1st Cir. 1975); or *In re Millow*, 529 F.2d 770 (2d Cir. 1975). In *Alter* the Ninth Circuit (482 F.2d at 1027) did not purport, as petitioners assert (Pet. 17-18), to establish a rigid six-point test under which every government response to a Section 3504 claim must be judged. Rather, the court concluded that the particular affidavit used by the government in that case was insufficient because it was conclusory and was not written by the persons who conducted the investigations at the agencies involved. Indeed, the Ninth Circuit's subsequent decisions in *In re Weir*, 495 F.2d 879, cert. denied, 419 U.S. 1038 (1974), and *United States* v. *See*, *supra*, recognize that the adequacy of the government's response to a Section 3504 claim turns on the facts and circumstances of the particular case.

In re Quinn, *supra*, likewise requires (525 F.2d at 225) that those responding be in a position to know

or reasonably ascertain whether or not illegal activities took place. In *United States* v. *Stevens*, *supra*, 510 F.2d at 1105, the court below specifically cited with approval the "fluid standard" of the Ninth Circuit in *United States* v. *See*, *supra*, 505 F.2d at 856 (which relied on *United States* v. *Alter*, *supra*). Under that standard the adequacy of the government's denial of a Section 3504 claim depends on the specificity of the allegations of illegality. *In re Millow*, *supra*, is to the same effect. There, the court relied upon *United States* v. *Stevens*, *supra*, stating (529 F.2d at 775) that "even under the strictest reading of § 3504" affidavits would constitute an adequate denial.

3. Finally, petitioners contend (Pet. 16-17, 22-25) that the denial in this case was not adequate because it failed to state that the government thoroughly searched its files. But as we have already pointed out, the government's denial of a Section 3504 claim need not follow any precise formula, but must only constitute a meaningful denial of the claim by those in a position to know the facts. Nor can petitioners point to any requirement in the statute, legislative history, or case law that the denial must include a specific recitation that the government had thoroughly searched its files. At all events, the response in this case, consisting of the testimony and affidavits of the very persons in each agency who conducted the investigations of petitioners, went far beyond a simple statement that the records had been searched and affirmatively established the source of the information that led to the issuance of the summonses.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1979

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